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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 546

CLAYTON M. JONES and AIMEE JONES, His Wife, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No.

CLAYTON M. JONES and AIMEE JONES, His Wife, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Roy St. Lewis and Carl L. Shipley, on behalf of Clayton M. Jones and Aimee Jones, his wife, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on October 28, 1953.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 207 F. 2d 563 and in the Record. (R. 45).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S. Code 1254.

QUESTIONS PRESENTED

1. Whether Section 2680(h) of the Federal Tort Claim Act, 28 U.S.C. 2671-2680, prohibits suits against the government on claims arising out of negligent misrepresentation.

2. Whether the trial court's refusal to accord plaintiffs the jurisdictional benefits of 28 U.S.C. 2671-2680 is a denial of due process of law.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S. Code 1346(b) provides in pertinent part:

> "Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of all such actions on claims against the United States, for money damages, * * * for injury or loss of property, or personal injury or deaths caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S. Code 2674 provides in pertinent part:

> "The United States shall be liable respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances * * *."

28 U.S. Code 2680(h) provides in pertinent part:

> "The provisions of this chapter and section 1346 (b) of this title shall not apply to— * * *
>
> (b) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

U.S. Constitution, Amendment V, provides in pertinent part:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *."

STATEMENT

Plaintiffs owned 70,888 shares of common stock of the Empire State Oil Company, Thermopolis, Wyoming, until January 1948, when they sold said stock. Practically all of Empire's oil production and reserves were contained in a 1000 acre tract of land known as Hamilton Dome in Hot Springs County, Wyoming. The United States owned the oil and gas rights in said land and leased it to Empire, and received royalties therefrom based on the production of oil.

On October 28, 1946, plaintiff Clayton M. Jones, acting for himself and his wife, wrote a letter to the U. S. Geological Survey as follows:

CLAYTON M. JONES
ATTORNEY AT LAW
NEW JONES BUILDING
113 EAST SECOND STREET
JAMESTOWN, NEW YORK

October 28, 1946.

United States Geological Survey,
Washington, D. C.

Gentlemen:

I am anxious to get Professional Paper 125 on Hamilton Dome, Wyoming.

I would also like to know what is the thickness of the Tensleep sand underneath this dome and also how much of same is saturated and also how many barrels of oil per acre it is estimated to contain and the quality or gravity thereof.

If there is any charge whatsoever will you kindly inform me and I will at once send same.

Trusting that you can be of assistance in this matter since practically all of the lands on this dome are gov-

ernment acreage and the government gets a royalty from the production, and thanking you for many past favors, I am

Very truly yours,

/s/ CLAYTON M. JONES.

On November 29, 1946, defendant answered as follows:

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY
WASHINGTON 25, D. C.

Nov 29 1946

Mr. Clayton M. Jones,
New Jones Building,
113 East Second Street,
Jamestown, New York.

My dear Mr. Jones:

Reference is made to your request of October 28 for a copy of Professional Paper 125 and certain data on the Tensleep sand, Hamilton Dome, Wyoming.

Professional Paper 125 does not contain any data on Hamilton Dome, and it is believed that you meant to refer to Professional Paper 145, entitled "Geology and oil and coal resources of the Oregon Basin, Meeteetse, and Grass Creek Basin quadrangles, Wyoming" by D. F. Hewett, published in 1926. Both of these papers are out of print, but it is probable that copies may be available for inspection in your local library or in the library of various colleges and universities in your locality.

The total thickness and thickness of the saturated section of the Tensleep sand is variable, but the productive area at Hamilton Dome is 1,000 acres. The ultimate recovery, the major portion of which will be from Tensleep sand, is estimated to be on the order of 17,400 barrels per acre. As of January 1, 1946, about 30 per cent of the recoverable reserves of the field had been produced. The gravity of Tensleep sand oil is about 17° A.P.I.

If further information on the field is desired, it is suggested that you submit your request directly to the Northwestern Regional office of the Geological Survey, Box 400, Federal Building, Casper, Wyoming.

Sincerely yours,

(S.) W. E. WRATHER,
Director.

Plaintiffs relied upon defendant's letter in fixing the sale price of their stock in Empire. As a result of defendant's negligence in estimating the reserves in the Hamilton Dome tract, plaintiffs suffered a loss of $236,376.04. Plaintiffs brought suit against the Government for damages under the Federal Tort Claims Act, 28 U.S.C., Sections 2671-2680. The United States Court of Appeals, Second Circuit, held that Section 2680 (h) of the Federal Tort Claims Act prohibits suits against the Government on claims arising out of "negligent misrepresentation."

ARGUMENT

The questions presented in this petition are of novel and far-reaching importance in that they involve the basic construction to be given the Federal Tort Claims Act, one of the most important remedial statutes ever enacted into law by the Congress of the United States. The Federal Government waived its sovereign immunity to tort claims with enactment of Title IV of the "Legislative Reorganization Act of 1946", P.L. 601, 79th Cong., 2d Sess. (Aug. 2, 1946 ¶¶ 401-424. This legislative reform undertaken by the 79th Congress represented the end product of nearly a century and a quarter of careful consideration The opinion of the court below cuts the heart out of the Act.

As long ago as February 23, 1832, John Quincy Adams said: "There ought to be no private business before Congress. There is a great defect in our institutions by want of a court of Exchequer or Chamber of Accounts. * * * A deliberative assembly is the worst of all tribunals for the administration of justice." 8 *Memoirs of John Quincy*

Adams (1876) 479-480. Abraham Lincoln, in a message to Congress on December 3, 1861, approved the principle of federal liability in tort, setting forth that it was as important for the Government to render prompt justice against itself as it was to administer it between individuals. *Miller, Life and Works of Abraham Lincoln* (1907), *State Papers* 37. On January 14, 1942 President Roosevelt sent a message to Congress endorsing the idea of federal liability on negligence claims. "As the Congress knows, this question has been considered many times before. During the past 20 years, members of Congress have frequently pointed out that the procedure for relief of tort claims by special act is slow, expensive, and unfair both to the Congress and to the claimant, and several attempts have been made to enact legislation submitting all negligence claims to administrative or judicial determination." H.R. Doc. No. 562, 77th Cong., 2d Sess. (1942) 2. Members of Congress had themselves expressed dissatisfaction with private bills and urged a reformed procedure as to torts. See 30 Geo. L. J. 462, 464 (1942). The report of the Joint Committee on Organization of the Congress recommended that Congress delegate to the federal courts authority to hear and settle tort claims against the Government. Sen. Rep. No. 1011, 79th Cong., 2d Sess. (1946) 25. On approximately thirty occasions during the last quarter century Congress had considered methods of removing the Federal Government's sovereign immunity as to torts, H.R. 12178, 68th Cong., 1st Sess. (1923); H.R. 6716, 69th Cong., 1st Sess. (1925); H.R. 8914, 69th Cong., 1st Sess. (1925); S. 1912, 69th Cong., 1st Sess. (1925); H.R. 9285, 70th Cong., 1st Sess. (1927); H.R. 17168, 71st Cong., 3d Sess. (1930); H.R. 15428, 71st Cong., 3d Sess. (1930); S. 4377, 71st Cong., 2d Sess. (1929); S. 4567, 72nd Cong., 1st Sess. (1931); H.R. 5065, 72nd Cong., 3d Sess. (1933); H.R. 129, 73rd Cong., 1st Sess. (1933); H.R. 8561, 73rd Cong., 2d Sess. (1934); S. 1833, 73rd Cong., 1st Sess. (1933); H.R. 2028, 74th Cong., 1st Sess. (1935); S. 1043, 74th Cong., 1st Sess. (1935); H.R. 7236, 76th Cong.,

1st Sess. (1939); S. 2690, 76th Cong., 1st Sess. (1939); H.R. 5299, 77th Cong., 1st Sess. (1941); H.R. 5373, 77th Cong., 1st Sess. (1941); H.R. 6463, 77th Cong., 2d Sess. (1942); S. 2207, 77th Cong., 2d Sess. (1942); S. 2221, 77th Cong., 2d Sess. (1942); H.R. 817, 78th Cong., 1st Sess. (1943); H.R. 1356, 78th Cong., 1st Sess. (1943); S. 1114, 78th Cong., 1st Sess. (1943); H.R. 181, 79th Cong., 1st Sess. (1945), finally culminating in the passage of the Federal Tort Claims Act. And for the first time in U.S. history the citizen had a remedy against his Government for its negligent torts.

From the above legislative history it is obvious that the whole spirit and purpose of the act was to get *all negligent tort claims* out of Congress and private bills and into the federal courts.

Thus, in construing the words used in the Act, it is necessary to determine their meaning in accordance with that legislative scheme and purpose. *Welch* v. *Comm. Int. Revenue*, 63 F. 2d 976; *Craig* v. *Boyes*, 11 P. 2d 673; *Brown* v. *Board of Appeals*, 327 Ill. 644, 159 N.E. 225; *Gilbert* v. *Greene*, 185 Ky. 817, 216 S.W. 105; *Commission* v. *Dee*, 222 Mass. 184, 110 N.E. 287; *Wiley* v. *Solvay Process*, 215 N.Y. 584, 109 N.E. 606; *State* v. *Leuch*, 155 Wis. 500, 144 N.W. 1122.

Starting from the point of departure of statutory purpose and intent, the words in the Act must be given their usual, ordinary, and natural meaning. *Miller* v. *Robertson*, 266 U.S. 243, 45 S. Ct. 73, 69 L. ed. 265; *Allen* v. *Moesman*, 46 F. 2d 891; *Eastern Ry.* v. *Matthews*, 20 Ariz. 282, 180 P. 159, 7 A.L.R. 1149; *Mays* v. *Robertson*, 172 Ark. 279, 288 S.W. 382; *Corbett* v. *State Board*, 188 Calif. 289, 204 P. 823; *Darius* v. *Apostolos*, 68 Colo. 323, 190 P. 510, 10 A.L.R. 986; *Rash* v. *Allen*, 24 Dela. 444, 76 Atl. 370; *Cook* v. *Massey*, 38 Ida. 264, 220 P. 1088, 35 A.L.R. 200; *Walgreen* v. *Ind. Comm.*, 323 Ill. 194, 153 N.E. 831, 48 A.L.R. 1199; *Smith* v. *State*, 172 N.E. 911; *First Nat. Bank* v. *Burke*, 201 Iowa 994, 216 N.W. 287; *Trading Stamp Co.* v. *Common*, 224 Ky. 136, 5 S.W. 2d 910; *Brown* v. *Robinson*, 175 N.E. 269; *People*

v. *Smith,* 246 Mich. 393, 224 N.W. 402; *West* v. *Lysle,* 302 Pa. 147, 153 Alt. 131; *State* v. *Phelps,* 171 Wis. 13, 176 N.W. 217; See also *Nix* v. *Hedden,* 149 U.S. 304, 37 L. ed. 745.

Petitioners have a constitutional right to have the established judicial rules of statutory construction applied to the Federal Tort Claims Act in determining jurisdiction as to their claim. *U. S. Const., Amd't V.*

2. The decision of the Court below turns upon its conclusion that Section 2680 (h) of the Federal Tort Claims Act prohibits suits against the Government arising out of *negligent misrepresentation.* This conclusion is premised upon a construction of the word "misrepresentation" as it occurs in Section 2680 (h), as follows:

> "Since 'deceit' means fraudulent misrepresentation, 'misrepresentation' must have been meant to include negligent misrepresentation." (R. 45, *et seq.*)

Petitioners contend this is an erroneous statement of the law, and deprives them of statutory and constitutional rights, and destroys the purpose of the Federal Tort Claims Act, and is an unconstitutional usurpation of the legislative function by a judicial court in that it purports to change the structure of the Act by judicial action. Essential functions of the legislature are not to be usurped by the judiciary. *Sen. Doc.* 232, *74th* Cong., 2d *Sess.*, p. 101. The duty of the federal courts is to judge, not legislate. *Chisholm* v. *Georgia,* 2 Dall. 419, 433 (1793); *Kilbourn* v. *Thompson,* 103 U.S. 168 (1881).

3. Petitioners contend that Congress considered many bills and chose words with care in passing the Act, and that the clear and unmistakable legislative purpose was a waiver of sovereign immunity as to *all negligent torts.*

The pertinent language of 28 U.S.C. 1346(b) is clear:

> " * * * the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for injury or loss of

property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

The language of the section leaves no doubt but that Congress conferred jurisdiction on the courts to hear *all negligence* claims, not only for personal injury, but for loss of property as well. The language used is all inclusive, and in keeping with the purpose of the Act to remove negligence claims from the halls of Congress to the courts.

Title 28, U.S.C. 2674, bears out this interpretation:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances * * *."

Here it is reemphasized that the Congressional purpose in the Act is to put the Federal Government in the same position as a private person as to tort claims.

The only limitation on federal liability is that set forth in Section 2680 by the Act:

> "The provisions of this chapter and Section 1346 (b) of this title shall not apply to * * *
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, *misrepresentation*, deceit, or interference with contract rights." (Emphasis supplied.)

The Congress itself has made it clear that Section 2680 (h) excepts only *intentional* torts from those for which the Government accepts liability:

> "This section (28 U.S.C. 2680) specifies *types* of claims which *would not* be covered by this title. They include

> * * * *deliberate torts* such as assault and battery; and others: * * *." (Emphasis supplied.) S. Rep. No. 1400, 79th Cong., 2nd Sess. (1946), p. 33; H. Rep. No. 1287, 79th Cong., 1st Sess. (1945) p. 6.

It is as clear as language can make it that the term *misrepresentation* as used in Section 2680 (h) is confined to *intentional* misrepresentation, and that *negligent misrepresentation* is included among the body of torts for which the Government stands ready to have its liability tested in the courts. Any other construction throws Section 2680 (h) into hopeless conflict with Section 1346 (b) which expressly includes *all negligent torts*. It is a well established principle of statutory construction that words in different parts of a statute must be referred to their appropriate connection so as to render none of them useless or superfluous, and to give each its proper force and effect so as to avoid inconsistencies, under the theory of "*reddendo singula singulis.*" By it, if the sense of the statute so requires, as in the case at bar, clauses and phrases are to be taken distributively. *U. S.* v. *Simms* (U.S.), 1 Cranch 252, 2 L. ed. 98; *U.S.* v. *Hartwell* (U.S.), 6 Wall. 385, 18 L. ed. 830; *Building and Loan Assoc.* v. *Sohn*, 54 W. Va. 101, 46 S.E. 222. Upon application of this principle, it is submitted, *negligent misrepresetnation* cannot be excepted from the Act.

3. The Federal Tort Claims Act is *remedial* in nature. As such it should receive a liberal construction in order to promote justice and carry out its purpose. *Stewart* v. *Overholser*, 186 F. 2d 339; *Mercado* v. *U.S.*, 183 F. 2d 486, 487; *Collins* v. *Hayden*, 104 Kan. 351, 179 P. 308. This is especially true where the result is to secure a speedier and more economical disposition of claims, as in the case at bar. *Scott* v. *Mayor*, 186 Ga. 652, 198 S.E. 693; *Eagle-Pitcher Lead Co.* v. *Mansfield Paint Co.*, 194 N.Y.S. 386, 201 App. Div. 223. The opinion of the court below fails utterly in the application of this principle. As stated by this Court, in a similar case involving a remedial statute, has said:

"This provision is highly remedial and should be liberally construed to effect the purposes of Congress and to give remedy in all cases intended to be covered." *Miller* v. *Robertson*, 266 U.S. 243, 248.

4. No part of a statute, whether it be a sentence, clause, phrase, or word, can be considered as mere surplussage or devoid of meaning. *Leversee* v. *Reynolds*, 13 Iowa 310; *Hagenbuck* v. *Reed*, 3 Nebr. 17. If the decision of the court below is allowed to stand, Section 1346 (b) of the Act is partly nullified and its purport wholly ignored.

5. The term "misrepresentation" as it occurs in Section 2680(h) is set forth in a general class of terms all having to do with *intentional torts*. It is contrary to common sense to imagine the Congress attached some other significance to "misrepresentation" than merely reference to the tort involving *intentional* misrepresentation. By application of the principle of *ejusdem generis*, "misrepresentation" must be limited to the intentional tort in accordance with the balance of the class of terms with which it is used. *Factor* v. *Laubenheimer*, 290 U.S. 276, 78 L. ed. 315; *U.S.* v. *Certain Lands*, 12 F. Supp. 345.

6. The Congress must have known that *negligent* misrepresentation is a well established principle of law, *Houston* v. *Thornton*, 122 N.C. 368, 29 S.E. 827; *Glazer* v. *Shepard*, 233 N.Y. 236, 135 N.E. 275; *Weston* v. *Brown*, 82 N.H. 157, 131 A. 141; *Mulroy* v. *Wright*, 185 Minn. 84, 240 N.W. 116; *Dickle* v. *Nashville Abstract Co.*, 89 Tenn. 431, 14 S.W. 896 (1890); *Brown v. Sims*, 22 Ind. App. 317, 53 N.E. 779, and had been recognized as a separate and distinct tort for more than half a century. Ordinarily the term "misrepresentation" used above is synonymous with the intentional tort of "fraud." Bohlen, Should Negligent Misrepresentations Be Treated as Negligence or Fraud? 18 Va. L. Rev. 703; Green, Innocent Misrepresentations, 19 Va. L. Rev. 742. Since Congress did not use the term "fraud" in Section 2680(h), it is quite obvious that the term "misrepre-

sentation" was used to describe that intentional tort in the Act. No other reasonable construction is possible. 52 Harv. L. Rev. 394; 51 Harv. L. Rev. 558.

7. Section 2680(h) is concerned with exceptions to the Act, and it is a basic rule of statutory construction that exceptions are narrowly and strictly construed, *U.S.* v. *Union Pac. Ry. Co.*, 20 F. Supp. 665; *Piedmont Ry. Co.* v. *U.S.*, 30 F. 2d 421; *Sinking Spring Water Co.* v. *Gring*, 26 Pa. Dist. 867; *Merchants National Bank* v. *Continental National Bank*, 98 Calif. App. 523, 277 P. 354, and all doubts must resolve against an exception and in favor of the general provisions of the Act. *Eddington* v. *Northwestern Bell Telephone Co.*, 201 Iowa 67, 202 N.W. 374; *N.J. State Board of Optometrists* v. *Kresge*, 181 Atl. 152, 115 N.J. L. 495. Thus it would seem "negligent misrepresentation" cannot be excepted from the Act unless specifically set forth. This Court has stated the rule:

> "The just purpose of the section is not to be defeated by a narrow interpretation, or by unnecessarily restricting the meaning of the word within technical limitations. *Miller* v. *Robertson*, 266 U.S. 243, 248.

8. When Congress confers a right it can constitutionally take it away, *Pflueger* v. *U.S.*, 121 F. 2d 732, but when Congress creates a right the courts cannot constitutionally take it away. *U. S. Const., Amdt. V.* In the case at bar petitioners had a statutory right to bring suit against the United States for negligent misrepresentation. 28 U.S.C. 1346(b) and 2671., et. seq. The court below deprived petitioners of this right by an erroneous application of the judicial rules of statutory construction.

CONCLUSION

The Federal Tort Claims Act was intended to confer a right of suit against the Government for all negligent torts. The intentional torts excepted from the Act are clearly spelled out. The Act is, itself, one of the most important

remedial statutes ever passed. It is now being tested in the crucible of application. The question of whether negligent misrepresentation is excepted from the Act is of crucial importance in the developing experience under the Act. Whether the Act succeeds or fails in its Congressional purpose, i.e., the removal of private bills for tort claims from Congress into the courts, depends to a large extent upon the proper resolution of this question.

It is respectfully submitted that this is a proper basis for certiorari and that a writ should be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 546

CLAYTON M. JONES AND AIMEE JONES, HIS WIFE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Western District of New York (R. 31-34) is not reported. The opinion of the Court of Appeals (R. 44-46) is reported at 207 F. 2d 563.

JURISDICTION

The judgment of the Court of Appeals was entered on October 28, 1953 (R. 46). A petition for rehearing was denied by an order entered Novem-

ber 20, 1953 (R. 53). The petition for a writ of certiorari was filed January 21, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the provision in the Tort Claims Act excluding suits against the Government on claims arising out of "misrepresentation" (28 U.S.C. 2680(h)) bars an action based on a negligent misrepresentation.[1]

STATUTE INVOLVED

The pertinent provisions of the Federal Tort Claims Act are set forth in the Appendix, *infra*, pp. 19-21.

STATEMENT

Petitioners brought this suit against the United States under the Federal Tort Claims Act. They seek damages for pecuniary loss resulting from their reliance upon misinformation contained in a letter written by the United States Geological Survey in reply to their request for an estimate of the recoverable oil in certain government owned

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[1] If certiorari is granted, the following questions, raised but not passed upon below, will also call for decision:

1. Whether, under the Tort Claims Act, the United States may be held liable to a member of the general public on a claim arising out of negligence in the performance of a public governmental function, such as the estimation by the Geological Survey of the oil reserves in government-owned lands;
2. Whether such a claim is barred by the discretionary function exception of the Tort Claims Act, 28 U.S.C. 2680(a);
3. Whether petitioners' claims are barred by limitation, 28 U.S.C. 2401; and
4. Whether the complaint states a cause of action which would create private liability under applicable local law, as required by the Tort Claims Act, 28 U.S.C. 1346(b), 2674.

land. The pertinent facts, as alleged in the complaint, are as follows:

The United States is the owner of the mineral, oil and gas rights in a 1000 acre tract of land known as Hamilton Dome, located in Hot Springs County, Wyoming. It leased the land to the Empire State Oil Company of Thermopolis, Wyoming, and thereafter received royalties from the company based upon the production of oil. (R. 4, 5.)

On October 28, 1946, petitioners wrote a letter to the United States Geological Survey asking, with reference to Hamilton Dome, "how many barrels of oil per acre it is estimated to contain" (*infra*, p. 21; R. 6). By letter dated November 29, 1946, the Director of the Geological Survey replied to the inquiry, stating in part: "The ultimate recovery * * * is estimated to be on the order of 17,400 barrels per acre. As of January 1, 1946 about 30% of the recoverable reserves of the field had been produced" (R. 6).[2]

At that time, petitioners owned some 70,888 shares of the common stock of the Empire State Oil Company (R. 6). Practically all of the Company's oil production and reserves were located on the leased land (R. 4). On January 22, 1948, fourteen months after receiving the Director's letter, and acting in reliance upon the estimate of the recoverable oil stated in that letter, petitioners

[2] Both petitioners' letter of inquiry and the Director's letter of reply were before the court below. Their full text is set out in the Petition (pp. 3-5) and in the Appendix of this brief, *infra*, pp. 21-23.

sold their stock at $1.72 per share. This was the approximate value of the stock based on the Director's estimate of an ultimate recovery of 17,400 barrels per acre. (R. 6.)[3]

Geological Survey had established offices in Wyoming to estimate the gas and oil reserves of the Hamilton Dome and other lands. When the agency wrote its letter to petitioners it had sufficient information available to compute accurately the ultimate recovery of oil from such land. (R. 5-6.) But the representations set forth in the Director's letter were made negligently and were false (R. 9). By 1951, the amount of oil extracted from the leased land had exceeded the 17,400-barrels-per-acre estimate (R. 6), and, although by custom such estimates vary as much as 20%, the Director's 1946 estimate had erred to the extent of 300% (R. 7). Based on present authoritative estimates of the production capacity of Hamilton Dome, the value of each share of common stock of the Empire State Oil Company is $5.16 (R. 7).

Petitioners did not discover the Director's "misrepresentation and negligence" until September 6, 1951, at which time Geological Survey gave information to petitioners which indicated the error. Prior to that date, petitioners were "kept misled" by the agency's failure to answer properly their

[3] It is important to observe that the complaint does not allege that in their letter of inquiry petitioners either identified themselves as stockholders or advised that the information sought would be relied upon in connection with the sale of their stock. Nor is there any allegation that the Government otherwise knew or should have known who petitioners were or the purpose for which the information was sought.

additional requests for information relating to the land (R. 8).

The complaint, seeking damages in the amount of $236,376.04, was filed July 2, 1952 (R. 1, 10).[4] In lieu of answering, the Government moved to dismiss the complaint on the grounds that it failed to state a claim upon which relief can be granted and that the court lacked jurisdiction over the causes alleged (R. 21-22). The motion was granted by the district court (R. 31-34) which, after considering the statutory duties of the Geological Survey and of its Director, held that the claims were barred by the discretionary function exception of the Tort Claims Act, 28 U.S.C. 2680(a). The Court of Appeals for the Second Circuit affirmed but on a different ground, *viz.*, that claims based on negligent misrepresentations are excluded from coverage of the Tort Claims Act by Section 2680(h). A petition for rehearing filed by petitioners (R. 48) was denied (R. 53).

ARGUMENT

As members of the general public, petitioners addressed a request to a government agency for information compiled by it in the course of the performance of a public function. Through this suit they seek to have the courts hold, in effect, that

[4] It asserts three causes of action: the first, that petitioners' damage was sustained by reason of the Government's negligence (R. 9); the second, by reason of the Government's fraud and deceit (R. 9); and the third, by reason of breach of an implied contract (R. 10). Petitioners abandoned the second and third causes in the district court (R. 32) and since then have not relied upon them.

there is an actionable warranty guaranteeing the accuracy of the agency's reply. Citing no case to indicate that any court has ever approved such a startling proposition,[5] petitioners attempt to extract some basis for a cause of action from the terms of the Tort Claims Act, contending that the Act permits suit "as to all negligent torts" (Pet. 8, 10), including a negligent misrepresentation.

While the question of whether the Act excludes from its coverage claims based upon negligent misrepresentation is one which may arise in other litigation,[6] we believe that the decision below barring such claims under the proviso excluding claims arising from "misrepresentation" (28 U.S.C. 2680(h)) is so manifestly correct as to require no review by this Court. There is no conflict. Indeed, the only other Court of Appeals which has directly examined the question expressly agrees with the decision below. *National Manufacturing Company et al.* v. *United States*, C.A. 8,

[5] Even as between private individuals, "It would certainly be turning the world upside down to hold that an individual who, either as a volunteer or by request, gratuitously gives a friend information upon a business matter, is liable if he merely fails to exercise reasonable care in acquainting himself with the underlying facts or to exercise sound judgment in estimating their effect." Bohlen, *Misrepresentation as Deceit, Negligence, or Warranty*, 42 Harv. L. Rev. 733, 742 (1929).

[6] So numerous are the Government's activities in which it gathers, analyzes, publishes, and distributes information, data, and statistics, which are used by persons in all walks of life, from housewife to technician, and so frequently do its employees respond orally or by letter to inquiries made by members of the public, that unquestionably innumerable occasions arise where negligence could result in the circulation of misinformation upon which someone might rely to his detriment.

decided February 8, 1954. Moreover, petitioners' complaint is deficient in so many other respects that it is unlikely that this Court would even reach the question presented by the petition. For not only are petitioners' claims excluded by the limitations provision of the Tort Claims Act (28 U.S.C. 2401) and by the discretionary function exception (28 U.S.C. 2680(a)), but, in addition, they must fail because they do not state a cause of action under applicable state law, a condition precedent to the right of recovery against the United States (28 U.S.C. 1346(b), 2674.[7]

1. *Negligent misrepresentation*—28 U. S. C. 2680(h) excludes from coverage of the Tort Claims Act:

> Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, *misrepresentation, deceit*, or interference with contract rights. [Emphasis added.]

Petitioners concede that their claim is based upon *misrepresentation*[8] but contend that a negli-

[7] A second question raised by the petition, that the denial of a right of action for negligent misrepresentation constitutes a denial of due process, is wholly without merit. It is elementary that in conferring the right to sue the United States, Congress may impose any restrictions or conditions upon the right that it wishes (*F.H.A.* v. *Burr*, 309 U.S. 242, 251). It can, of course, exclude claims based on negligent misrepresentation just as it can, and did, exclude claims based on assault and battery (28 U.S.C. 2680(h)).

[8] In particularizing the claim, the complaint repeatedly refers to the Director's "representations", "misrepresentations" and "gross misrepresentations". It alleges that petitioners relied upon the "representations" made in the letter (Pars. 16th

gent misrepresentation, as distinguished from a wilful misrepresentation, is not covered by this exception. The contention stems from two erroneous premises, first, that the Act waives sovereign immunity "as to all negligent torts" (Pet. 8, 10), and second, that the entire subsection 2680(h) relates only to intentional torts (Pet. 9, 11). But "all negligent torts" are not actionable under the Act; this is patent from a reading of Section 2680 in its entirety. See *Dalehite* v. *United States*, 346 U. S. 15, 32. And as to Section 2680(h), while it is true that a number of the torts listed there are exclusively intentional torts, such as assault, battery and deceit, it is equally true that others may be based upon negligent rather than intentional conduct. For example, in the case of libel and slander it is settled that liability attaches for publishing the defamation, even in the absence of an intent to defame. *Corrigan* v. *Bobbs-Merrill Co.*, 228 N.Y. 58; *Smith* v. *Utley*, 92 Wisc. 133; see Prosser, *Torts* (1941), pp. 818-819. And damages have regularly been allowed for a negligent rather than an intentional interference with contract rights.[9]

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and 26th; R. 6, 8); that they were "misled" and "kept misled" (Par. 24th, R. 8) by these "misrepresentations" (Pars. 19th, 24th, 25th and 29th; R. 7, 8, 9), and that the "representations" were "false" (Par. 29th; R. 9). The petition proceeds on the same theory.

[9] Thus, telegraph companies have been held liable for interference with contract rights caused by the negligent transmission of messages (*Western Union Tel. Co.* v. *Bowman*, 141 Ala. 175; *McPherson* v. *Western Union Tel. Co.*, 189 Mich. 471), and a negligent interference with a master's contractual right

Since Section 2680(h) is not limited to intentional torts, there is no barrier to interpreting the word "misrepresentation" as including negligent misrepresentation. And the fact that "misrepresentation" appears in contradistinction to "deceit" in this exclusionary section demonstrates Congress' purpose to remove from the Act's coverage, not only claims based upon deliberate misrepresentation, but also those based upon negligent or innocent misrepresentation. If only deliberate misrepresentation were meant to be excluded, the word "deceit" would have sufficed, and, as the court below observed (R. 46), the additional term "misrepresentation" would then be duplicative. To ascribe some separate significance to the word "misrepresentation" requires that it be construed as something other than deceit. See *United States* v. *Silverton*, 200 F. 2d 824, 826 (C.A. 1) (indicating that the exception bars an action for warranty); *Fletcher* v. *Veterans Administration*, 103 F. Supp. 654, 656 (E.D. Mich.) (negligent misstatements). Actually, the word is well understood in the law of torts as meaning much more than deceit. [10]

A contention identical with that made by petitioners was advanced before the Court of Appeals

to his employee's services warrants recovery of damages for loss of such services (*Ames* v. *Union Railway Co.*, 117 Mass. 541; cf. *United States* v. *Standard Oil Co.*, 332 U.S. 301, 312).

[10] The word "misrepresentation" encompasses an area in the law of torts which is "considerably broader than the action for deceit. Liability in damages for misrepresentation, in one form or another, falls into three familiar divisions * * * —it may be based [1] upon intent to deceive, [2] upon negligence, or [3] upon a policy which requires the defendant to be strictly responsible for his statements without either." Prosser, *Torts* (1941), pp. 704, 707, 726; Bohlen, *Misrepresentation as*

for the Eighth Circuit in *National Manufacturing Company et al.* v. *United States,* decided Feb. 8, 1954, where the claimants, also suing under the Tort Claims Act, alleged that they had suffered property damage (during the 1951 Kansas River floods) by reason of their reliance upon misinformation negligently issued by the United States Weather Bureau. The court [10a] flatly rejected the argument (slip op., p. 22.)

> Appellants' argument that Section 2680(h) applies only to wilful misrepresentations and does not apply to the claims of negligent misrepresentation which are here asserted has been fully considered but we do not sustain it. We are in accord with the holding of the Second Circuit in *Jones* v. *United States* * * *.

The Eighth Circuit quoted from the opinion below and even went a step further when it held that the section also precludes recovery based upon the Weather Bureau's failure to issue information. "The intent of the section," said the court, "is to except from the Act cases where mere 'talk' or failure to 'talk' on the part of a government employee is asserted as the proximate cause of damage sought to be recovered from the United States" (slip op., p. 24). [11]

Deceit, Negligence, or Warranty, 42 Harv. L. Rev. 733 (1929). Compare *Restatement of Torts,* § 525 with *ibid.,* § 552. See 23 Am. Jur., pp. 917-920.

[10a] Judge Johnsen refers to Judge Woodrough's opinion as "the court's opinion" (slip op., p. 29).

[11] In commenting on the instant case, Judge Johnsen, in a concurring opinion which also expressed the views of Judge

The legislative history of this section of the Tort Claims Act, though not very illuminating, lends no support whatever to petitioners' contention.[12]

2. *Limitations*—Even if the Tort Claims Act

Sanborn, indicated he would have chosen a much broader ground for dismissal, *i.e.*, "that no liability exists at all against the Government for inaccuracy in the furnishing of such public information. * * * To me, it is unnecessary to scan the special exceptions from the coverage made by the Act for the reason that liability for inaccuracy in the gathering or dissemination of such public information has never been within the coverage of the Act, so that it is unnecessary to remove it on the basis of any exception." (slip op., p. 31, fn. 3).

[12] The Tort Claims Act was enacted in 1946 as Title IV of the Legislative Reorganization Act, 60 Stat. 842, after twenty-seven different bills dealing with tort claims had been introduced in Congress since 1923. See, *Dalehite* v. *United States*, 346 U.S. 15, 24-29; *United States* v. *Spelar*, 338 U.S. 217, 219-221. The first appearance of an exclusionary section virtually identical with 28 U.S.C. 2680(h) was in Sec. 206 of S. 211, 72d Cong., 1st Sess. (1931), and thereafter almost every subsequent tort claims bill introduced carried a similar exception. But there was no explanatory comment until 1940. The clause was then in Sec. 203(9) of S. 2690, 76th Cong., 1st Sess. A Department of Justice memorandum commenting on this section, stated: "It excepts from the scope of the act a series of torts as to which, for the time being at least, it may be dangerous for the Government to subject itself to suit, until in any event considerable experience has been had under the proposed legislation." *Hearings before a Subcommittee of the Committee on the Judiciary, U.S. Senate, 76th Cong., 3d Sess., on S. 2690* (Mar. 6 and 11, 1940), p. 13. Alexander Holtzoff, representing the Department, testified before the subcommittee: "Clause 9 proposes to exclude from the cognizance of the law claims arising out of assault, battery, false imprisonment, false arrest, and so forth, a type of torts which would be difficult to make a defense against, and which are easily exaggerated. For that reason it seemed to those who framed this bill that it would be safe to exclude those types of torts, and those should be settled on the basis of private acts." *Ibid.*, p. 39.

Referring to the bill which was finally enacted, the Senate Committee stated in its Report, "This section [28 U.S.C. 2680] specifies *types* of claims which would not be covered by the title. They include * * * deliberate torts such as assault and battery; *and others.* * * *" [emphasis added]. S. Rep. No. 1400, 79th Cong., 2d Sess. (1946), p. 33. See also, H. Rep. No. 1287, 79th Cong., 1st Sess. (1945), p. 6. This quotation

does permit suit based upon a negligent misrepresentation, petitioners' claims fall because they are barred by limitations. The original one year statute of limitations of the Tort Claims Act (60 Stat. 845) was amended on April 25, 1949, so as to provide that a tort claim against the United States is barred "unless action is begun within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later" (28 U.S.C. 2401(b), 63 Stat. 62).[13] The Director's letter containing the negligent misstatement was written on November 29, 1946. Relying on that letter, petitioners sold their stock on January 22, 1948. Whether their claim accrued when the negligent act was committed or when the sale was consummated and damages were sustained (cf. *Carnes* v. *United States,* 186 F. 2d 648, 650 (C.A. 10)), it is apparent that, unless something tolled the statute, the period of limitations

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substantiates the view that the exclusion was meant to cover not only deliberate torts, such as assault and battery, but other torts which, unlike assault and battery, are not deliberate but merely negligent.

[13] The statutory period prescribed in the Tort Claims Act controls to the exclusion of any state rule. *United States* v. *Westfall,* 197 F. 2d 765, 766 (C.A. 9); *Maryland* v. *United States,* 165 F. 2d 869 (C.A. 4); cf., *Holmberg* v. *Armbrecht,* 327 U.S. 392, 395. The defense of limitations is available on a motion to dismiss. *Berry* v. *Chrysler Corporation,* 150 F. 2d 1002 (C.A. 6); *Gossard* v. *Gossard,* 149 F. 2d 111 (C.A. 10). Although limitations was not specifically mentioned in the motion to dismiss, the point was passingly noted in the Government's District Court brief and urged before the Court of Appeals. It is settled that timely institution of an action is a condition of the right to sue the United States, hence the failure of the Government to plead limitations cannot constitute a waiver of the defense. *Finn* v. *United States,* 123 U.S. 227, 232-233; *Munro* v. *United States,* 303 U.S. 36, 41.

expired April 25, 1950. Suit was not begun until July 2, 1952, more than two years too late.

Petitioners' allegation (R. 8) that they did not discover the negligent misrepresentation until September 6, 1951, because of the Director's refusal to give them additional information, does not remove the cause from the operation of the statute. True, in a case of *fraud,* if the claimant is ignorant of the fraud without any fault on his part, the statute will not run until the fraud is discovered, though there be no effort on the part of the person committing the fraud to conceal it from the other's knowledge. *Holmberg* v. *Armbrecht,* 327 U. S. 392, 397. But here petitioners are at pains to stress that this is not an action for fraud, because such an action is not within the coverage of the Tort Claims Act; rather, they stress that this is an action for negligence. It is settled law, however, that a failure by the injured party to discover the negligence is no barrier to limitations. In negligence causes, "the statutory period of limitations begins to run from the time when liability for wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury." *Schmidt* v. *Merchants Despatch Trans. Co.,* 270 N. Y. 287, 300. Applying this rule, the period of limitations began to run, at the latest, when the sale took place, not when the petitioners discovered the alleged negligence in the estimate of oil reserves. The claim was therefore barred on April 25, 1950.

3. *Discretionary function*—The determination

by the Geological Survey that certain of the public lands contain oil deposits, and the estimate and extent of such deposits, are administrative acts integral to the agency's duties in carrying out the nation's conservation policy and in supervising oil land leases. As such, they are not subject to judicial inquiry (*Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324-325; *Wann* v. *Ickes*, 92 F. 2d 215 (C.A. D.C.)), and private claims arising out of these activities are barred from suit by the discretionary function exception of the Tort Claims Act, 28 U.S.C. 2680(a).

The Geological Survey was established in 1879 to engage in "the classification of the public lands and examination of the geological structure, mineral resources, and products of the national domain." 43 U.S.C. 31. Its functions include *inter alia* the making of topographical and geological surveys and the publication and dissemination of information concerning its activities. 43 U.S.C. 41-45; see 5 U.S.C. (1946 Ed., Supp. V) 488, 489. It also has a significant role in the administration of the lands of the United States. Its findings, and specifically its determination of whether or not public lands contain oil or gas, are important in connection with the national policy of conservation of resources (cf. *United States* v. *Wilbur*, 283 U. S. 414, 418-419), as well as for the disposal of government lands (see *Kinney-Coastal Oil Co.* v. *Kieffer*, 277 U. S. 488, 504). The Mineral Leasing Act of February 25, 1920, as amended (30 U.S.C. 181 *et seq.*), authorizes the Secretary of

the Interior to issue oil and gas leases on the public lands. However, the terms on which such leases are issued depend in part on whether the land for which an application is filed lies within a known productive geological structure. [14] Also, the operations of the lessees must be supervised so as to conserve the mineral resources. The Secretary has charged the Geological Survey with the duty of determining and defining possible oil structures in connection with the issuance of oil and gas leases on the public lands (43 C.F.R. 192.3), and with the duty of supervising operations under such leases (30 C.F.R. 221.1).

The estimate of the oil in Hamilton Dome, which is related in the Director's letter to petitioners and is the gravamen of the complaint, was obviously made in furtherance of these functions rather than in compliance with petitioners' special request. In fact, the latter activity is prohibited. [15] In these circumstances, the making of the estimate was an administrative and discretionary act beyond judicial inquiry. In *Wann* v. *Ickes, supra,* it was held that the determination by the Secretary of the Interior, based upon information supplied by

[14] Land that is within a known geological structure of a producing oil or gas field is leased on the basis of competitive bidding, the lease going to the highest qualified bidder. On the other hand, lands which are not within any known geological structure of a producing oil or gas field must be let without bidding to the qualified person who first applies for a lease. 30 U.S.C. 226. See *Wann* v. *Ickes, supra.*

[15] 43 U.S.C. 31 places the duty of classifying the public lands and of examining the geological structure of the national domain upon the Geological Survey and its Director. It then specifically provides that they "shall execute no surveys or examinations for private parties or corporations."

the Geological Survey, that certain lands were within a known oil field was conclusive and not reviewable in the courts; the courts will not "entertain an inquiry as to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination." 92 F. 2d at 217. See also *De Cambra* v. *Rogers*, 189 U. S. 119, 122. The discretionary function exception of the Tort Claims Act, 28 U.S.C. 2680(a), prevents a claimant from indirectly attacking such an administrative determination.

That exclusionary section is applicable not only to the making of the estimate but also to the decision to reveal or publicize the erroneous determination. For that, too, was an act of discretion akin to the making of the estimate. Cf. *Schmidt* v. *United States*, 198 F. 2d 32 (C. A. 7), certiorari denied, 344 U. S. 896. [16]

4. *Lack of comparable private liability*—Finally, a further reason why this Court need never reach the question raised in the petition is that, even without reference to the provisions of the Tort Claims Act discussed above, the complaint is fatally defective because it does not state a cause of action

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[16] In speaking with reference to matters under his charge or in releasing public information, even though it is erroneous or deliberately false, a public official is himself immune from suit by one who is thereby damaged. *Glass* v. *Ickes*, 117 F. 2d 273 (C.A.D.C.), certiorari denied, 311 U.S. 718; *Jones* v. *Kennedy*, 121 F. 2d 40 (C.A.D.C.), certiorari denied, 315 U.S. 665; *Mellon* v. *Brewer*, 18 F. 2d 168 (C.A.D.C.), certiorari denied, 275 U.S. 530. This suggests an additional reason why the Government cannot be liable here, for, if a person who causes injury is himself immune from civil liability, "his employer must also be entitled to a like immunity." *N.O. & N.E. Railroad Co.* v. *Jopes*, 142 U.S. 18, 24.

which would predicate private liability "under like circumstances." 28 U.S.C. 1346(b), 2674; see *Feres* v. *United States*, 340 U.S. 135, 141.

There are three requirements for creating liability for the negligent use of language: (1) the words must be spoken directly to the other party; (2) the speaker must know they will be relied on; and (3) there must be a relationship between the parties giving rise to a duty to speak with care. *Courteen Seed Co.* v. *Hong Kong & S.B. Co.*, 245 N. Y. 377, 381; *Ultramares Corp.* v. *Touche*, 255 N. Y. 170, 185. Here, only the first requirement is met. There is no allegation that the Government had any knowledge as to the purpose of the information sought by petitioners or even that they had any business transaction in mind. This alone defeats the cause. *International Products Co.* v. *Erie R. R. Co.*, 244 N. Y. 331, 338, certiorari denied, 275 U. S. 527; *Renn* v. *Provident Trust Co.*, 328 Pa. 481; see, *Restatement of Torts*, § 552. The relationship which must exist between the parties to create an actionable duty of speaking with care must be "a contractual relationship or its equivalent" (see, *State Street Trust Co.* v. *Ernst*, 278 N. Y. 104, 111; *O'Connor* v. *Ludlam*, 92 F. 2d 50, 53 (C. A. 2), certiorari denied, 302 U. S. 758), the "equivalent" being akin to a fiduciary relationship (cf. *Restatement of Torts*, § 552). No such relationship is alleged. [17]

[17] Petitioners' ownership of stock in the Empire State Oil Co. did not make them party to that company's contract (lease) with the Government. Moreover, as we have already noted (*supra*, p. 4, fn. 3), petitioners' stock ownership was never disclosed to the Geological Survey.

In any event, the Geological Survey's letter to petitioners purports to give no more than an *estimate* of the probable oil reserves, *i.e.*, an opinion or guess. "The law does not fasten responsibility upon one for expressions of opinion as to matters in their nature contingent and uncertain." *Gordon* v. *Butler*, 105 U. S. 553, 557 (approving *Holbrook* v. *Connor*, 60 Me. 578, involving misstatements as to the extent of oil deposits in land). And see *Southern Development Co.* v. *Silva*, 125 U. S. 247 (amount of ore in a mine); *Lehigh Zinc & Iron Co.* v. *Bamford*, 150 U. S. 665, 673 (value of a mine).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.

WARREN E. BURGER,
Assistant Attorney General.

PAUL A. SWEENEY,
LESTER S. JAYSON,
Attorneys.

FEBRUARY, 1954.

APPENDIX

A. Sections 1346(b), 2674, 2680 and 2401(b) of Title 28 U.S.C. (the reenactment of the Federal Tort Claims Act) [18] provide in pertinent part:

Section 1346. *United States as defendant.*

* * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

Section 2674. *Liability of United States.*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same

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[18] The Federal Tort Claims Act (60 Stat. 842, 28 U.S.C. (1946 ed.) 921 *et seq.*) was repealed and its provisions were revised and reenacted into law as 28 U.S.C. (Supp. V) 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 by the Act of June 25, 1948, effective September 1, 1948, 62 Stat. 869. Existing rights and liabilities were not affected by the repeal (62 Stat. 992).

extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * *

Section 2680. *Exceptions.*

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * * * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

* * * * *

Section 2401. *Time for commencing action against the United States.*

* * * * *

(b) A tort claim against the United States shall be forever barred unless action is begun

within two years after such claim accrues or within one year after the date [April 25, 1949] of enactment of this amendatory sentence, whichever is later * * *.

B. Appellant's letter of inquiry and the Geological Survey's letter of reply are as follows:

CLAYTON M. JONES
Attorney at Law
New Jones Building
113 East Second Street
Jamestown, New York

October 28, 1946.

United States Geological Survey,
Washington, D. C.

Gentlemen:

I am anxious to get Professional Paper 125 on Hamilton Dome, Wyoming.

I would also like to know what is the thickness of the Tensleep sand underneath this dome and also how much of same is saturated and also how many barrels of oil per acre it is estimated to contain and the quality or gravity thereof.

If there is any charge whatsoever will you kindly inform me and I will at once send same.

Trusting that you can be of assistance in this matter since practically all of the lands on this dome are government acreage and the government gets a royalty from the production, and thanking you for many past favors, I am.

Very truly yours,

(S.) CLAYTON M. JONES.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Geological Survey
Washington 25, D. C.

Nov. 29 1946

Mr. CLAYTON M. JONES,
New Jones Building,
113 East Second Street,
Jamestown, New York.

My dear Mr. JONES:

Reference is made to your request of October 28 for a copy of Professional Paper 125 and certain data on the Tensleep sand, Hamilton Dome, Wyoming.

Professional Paper 125 does not contain any data on Hamilton Dome, and it is believed that you meant to refer to Professional Paper 145, entitled "Geology and oil and coal resources of the Oregon Basin, Meeteetse, and Grass Creek Basin quadrangles, Wyoming" by D. F. Hewett, published in 1926. Both of these papers are out of print, but it is probable that copies may be available for inspection in your local library or in the library of various colleges and universities in your locality.

The total thickness and thickness of the saturated section of the Tensleep sand is variable, but the productive area at Hamilton Dome is 1,000 acres. The ultimate recovery, the major portion of which will be from Tensleep sand, is estimated to be on the order of 17,400 barrels per acre. As of January 1, 1946, about 30 per cent of the recoverable re-

serves of the field had been produced. The gravity of Tensleep sand oil is about 17° A.P.I.

If further information on the field is desired, it is suggested that you submit your request directly to the Northwestern Regional office of the Geological Survey, Box 400, Federal Building, Casper, Wyoming.

Sincerely yours,

(S.) W. E. WRATHER,
Director.

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HAROLD B. WILLEY, Cl

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 546

CLAYTON M. JONES and AIMEE JONES, His Wife, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

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PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

Now come Clayton M. Jones and Aimee Jones, his wife, petitioners in the above entitled matter and petition this Honorable Court pursuant to Rule 33, for a rehearing on their petition for a writ of certiorari filed herein on January 21, 1954, on the basis of substantial grounds available to petitioner although not previously presented, as follows:

1. The complaint in the case under review alleges "negligence" as well as "misrepresentation."

2. Title 28 U. S. Code 1346(b) confers on plaintiffs a vested right to sue the United States under the Federal Tort Claims Act for damages caused them by the negligence of federal employees.

3. Even though plaintiffs are barred from recovery on grounds of misrepresentation by 28 U. S. Code 2680(h), they are not barred from proceeding on the theory of negligence, if they would have a cause of action under the law of the place where the negligent act occurred (28 U. S. Code 1346(b) and 2674).

4. The impact of respondent's negligence occurred in the State of New York, making that the applicable substantive law. *Young* v. *Masci,* 289 U. S. 253, 77 L. ed. 1158.

5. The law of the State of New York gives plaintiffs a substantive right of action for "carelessness in making statements", "negligent statement" or "negligence in the spoken word". As stated in *Nichols* v. *Clark, McMullen and Riley,* 261 N.Y. 118, 125, 184 N. E. 729, the rule in New York is:

> "The cause of action, if any, is rather based upon the recent doctrine of negligence in the spoken word and liability for carelessness in making statements upon which others were expected to rely and upon which they did act to their damage. A negligent statement may be the basis for recovery of damage. International Products Co. v. Erie R.R. Co., 244 N.Y. 331, 155 N.E. 662, 56 A.L.R. 1366; Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275, 23 A.L.R. 1425; Ultramares Corp. v. Touche, 255 N.Y. 170, 174, N.E. 441, 74 A.L.R. 1139. See also, 42 Harvard Law Review (1929) p. 733; 24 Harvard Law Review, 415; 14 Harvard Law Review, 184; 36 Yale Law Journal, 1028; Doyle v. Chatham & Phoenix Nat. Bank, 253 N.Y. 369."

This case defines a right of action for negligence which is neither coextensive with nor limited to misrepresentation. The distinction is the difference between a careless representation and a misrepresentation. The plaintiffs herein were entitled to have their claim tested against the Federal Tort Claims Act in the light of the local law contained in the *Nichols* case. Unless this Court grants certiorari, plaintiffs and similarly situated persons are forever deprived of the rights conferred on them by Congress in said Act.

6. The judgment of the United States Court of Appeals petitioned from herein errs in that it bars plaintiffs from their statutory right to sue for negligence under the rule in *Nichols* v. *Clark, supra,* as distinguished from a cause of action for misrepresentation which has been held to be barred by 28 U. S. Code 2680(h). If said judgment is permitted to stand, plaintiffs are debarred from any adequate remedy at law or in equity.

Wherefore, the premises considered, plaintiffs pray that upon rehearing their petition for a writ of certiorari herein be granted in order that a substantial question of far reaching import may be properly reviewed.

ROY ST. LEWIS,
CARL L. SHIPLEY,
982 National Press Building,
Washington 4, D. C.
Attorneys for Petitioners.

Certificate of Counsel

Roy St. Lewis and Carl L. Shipley, counsel for petitioners herein, certify that they have read the above written petition for rehearing of order denying certiorari, and know the contents thereof, and that said petition is presented in good faith and not for delay, and said counsel further certify that the above mentioned petition is restricted to grounds specified in Rule 33 of the Rules of this Court.

ROY ST. LEWIS,

CARL L. SHIPLEY.

Of Counsel:

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Jamestown, New York.